IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 3

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COMPANIA TRASATLANTICA, also known as SPANISH LINE and GARCIA & DIAZ, INC., and QUIN LUMBER CO., INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Francisco Romero, a disabled Spanish seaman injured aboard a Spanish merchant vessel in Hoboken Harbor, Hoboken, New Jersey, by reason of unseaworthiness of the vessel and negligence of the shipowner and three American corporations, and treated in an American hospital, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled matter.

The Opinions of the Courts Below

The opinion of the United States District Court, Southern District of New York (R. 247-253a; Sugarman, D. J.) printed in the Appendix hereto *infra*, page 40 is reported in 142 F. Supp. 570 and 1956 A. M. C. 1579.

The *per curiam* opinion of the Court of Appeals for the Second Circuit (Hincks, Lumbard and Waterman, JJ.), printed in the Appendix hereto *infra*, page 47 has not yet been officially reported.

Jurisdiction

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered April 30, 1957.

The jurisdiction of this court is found in 28 U. S. C. A. Sec. 1254 (1) and 2101 (c).

Questions Presented

1. Whether under 28 U. S. C. Sec. 1331 the district court has and should exercise jurisdiction (a) of plaintiff's claims under the general maritime law of the United States and (b) of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688).

2. Whether (a) the general maritime law of the United States and (b) the provisions of Section 33 of the Jones Act (46 U. S. C. Sec. 688) apply to the tort where a foreign seaman employed on a foreign ship suffers injuries, due to unseaworthiness of the vessel and negligence of its owner, its American agent and American stevedores and carpenters, while the ship is tied up at a pier in the port of Hoboken, New Jersey, for unloading and reloading, and the plaintiff is treated for his injuries for eight months in St. Mary's Hospital, Hoboken, New Jersey.

3. Whether such questions are questions of merits, to be tried and determined only in *exercise* of a fastened jurisdiction, and cannot, on motion to dismiss for "lack

of jurisdiction of the subject matter", be changed from questions of merits into a question of jurisdiction and be tried and determined on such motion as a question of jurisdiction; and

Whether on such motion the District Court lacked authority to hear and determine the merits of a defense based on an alleged prior Spanish contract and the laws of Spain as allegedly affording plaintiff a sole remedy against his employer.

4. Whether the treaty with Spain and its partial abrogation pursuant to the mandate of the Seaman's Act of 1915, prior to enactment of Section 33 of the Jones Act as an amendment of said Seaman's Act, prevents or permits the Court to exercise jurisdiction in a case such as this.

5. Whether the election given by Section 33 of the Jones Act (46 U. S. C. Sec. 688) to "Any seaman" to maintain an action for damages at law with a right of trial by jury, and its incorporating the provisions of Section 5 of the Federal Employers Liability Act (45 U. S. C. Sec. 55) that "Any contract, rule, regulation or device whatsoever" to exempt a carrier from liability under the statute shall to that extent be void, preclude holding that the jurisdiction of the district court can be defeated by a prior contract to have claims for injuries sustained by the seaman controlled by the law of Spain.

6. Whether evidence offered by defendants, on their motions to dismiss for "lack of jurisdiction of the subject matter", either to refute allegations of the complaint as to ownership, management, operation or control of the vessel, or to establish alleged defenses of foreign law and prior agreement between plaintiff and the foreign shipowner to have claims for injuries sustained while in the

employ of such defendant controlled by the law of Spain, should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motion to strike the same; and whether the Court's findings based thereon should be reversed and stricken out.

7. Whether the district court, having jurisdiction of plaintiff's claims under Section 33 of the Jones Act (46 U. S. C. Sec. 688) and for unpaid wages, has and should exercise pendent jurisdiction of plaintiff's claims under the general maritime law of the United States against the same defendant, even if jurisdiction of such maritime law claims were otherwise lacking under 28 U. S. C. Sec. 1331.

8. Whether the district court has and should exercise jurisdiction under 28 U. S. C. Sec. 1332 of plaintiff's claims against the three American defendants by reason of diversity.

9. Whether the district court, if it lacked jurisdiction at law, has and should exercise jurisdiction in admiralty.

10. Whether it was error to dismiss for lack of jurisdiction of the subject matter the action of this disabled foreign seaman plaintiff (a) against the owner and operators of the foreign vessel for damages, maintenance and cure and unpaid wages, under the general maritime law of the United States and all statutes amendatory thereof, including specifically Sec. 33 of the Jones Act, and (b) against American third-party defendants for damages under the general maritime law of the United States.

Constitutional and Statutory Provisions Involved

The provisions involved of the United States Constitution (Art. III, Sec. 2, and Art. VI, cl. 2) and statutes (Judicial Code, 28 U. S. C. Secs. 1331, 1332, 1333, 1652;

Jones Act of June 5, 1920, ch. 250, Sec. 33, 41 Stat. 1007, 46 U. S. C. Sec. 688; and Federal Employers Liability Act of April 22, 1908, ch. 149, Secs. 1; 5, 35 Stat. 66, 45 U. S. C. Secs. 51, 55) are printed in the Appendix hereto, *infra*, pages 37-39.

Statement of the Case

Petitioner, a Spanish seaman and member of the crew of the Spanish S. S. Guadalupe was tragically injured on board the vessel while it was tied up at Pier No. 2, Hoboken, New Jersey on May 12, 1954, to unload passengers' baggage and take on cargo, and lumber for erecting shifting boards for grain cargo.

Petitioner's left leg was severed and his right leg broken with multiple fractures, in addition to other bodily injuries. At point of death he was placed in St. Mary's Hospital, Hoboken, New Jersey where he underwent treatment from May 12, 1954 until January 11, 1955 (R. 107a), a period of eight months.

No compensatory damages, compensation, maintenance and cure nor wages have been paid to petitioner or the hospital since the injury. The hospital bill of St. Mary's Hospital for $3,750.60 remains unpaid, and a lien therefor was filed by the hospital against any recovery petitioner may secure in this action (R. 109a-110a). Other bills of Americans including that for an artificial limb for petitioner and for burial of the amputated part of his leg also remain unpaid.

Petitioner as plaintiff instituted an action at law against the Spanish corporate owner, Compania Trasatlantica, also known as Spanish Line (Compania) and three American corporations, Garcia & Diaz, Inc. (Garcia), International Terminal Operating Co. (International), and Quin Lumber Co., Inc. (Quin). A jury trial was demanded.

The amended complaint alleged that Compania and Garcia each owned, operated, controlled and managed the

136, 143, 144-146, in which Chief Justice Marshal distinguished the case of merchant vessels in our ports from that of foreign national ships of war. It emphasized the exclusive and absolute jurisdiction of the nation within its own territory and the full and complete power of the nation.

In the recent case of *William S. Girard,* decided July 11, 1957, and not yet officially reported, this Court cited *The Schooner Exchange* v. *McFaddon, supra,* in sustaining the jurisdiction of Japan to try an American solidier for the killing of a Japanese woman while he was on duty guarding, as a member of the American occupation forces in Japan, a machine gun and clothing at Camp Weir Range area, Japan. This was notwithstanding that American officials had originally claimed, under the provisions of the treaty with Japan, exclusive jurisdiction to try Girard and apply in his trial American law.

In *Wildenhus's Case,* 1887, 120 U. S. 1, 4-5, cited by this Court in *Uravic* v. *Jarka Co., supra,* this Court considered a Belgian treaty, Article XI of which reserved less from its waiver of jurisdiction than does Article XXIII contained in the Spanish Treaty of 1903 (Treaty Series, No. 422, reprinted by the Government Printing Office in February, 1954).* Article XI of the Belgian treaty involved in *Wildenhus' Case* provided:

> "Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed" (120 U. S. 18).

The Spanish treaty of 1903 in Art. XXIII more broadly excepted from any treaty waiver of American jurisdiction any disorder which should happen on board a Spanish vessel in the territorial waters of the United States

> "when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or

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* Art. VI and abrogated Art. XXIII of the Spanish Treaty of 1903 are printed in Appendix, *infra,* pages 47-48.

vessel, and that plaintiff was employed by each of said defendants. International had with Garcia a stevedoring contract to load and Quin a carpentering contract to make shifting boards for a grain cargo.

The amended complaint in four causes of action sought damages against the defendants Compania and Garcia under Section 33 of the Jones Act for negligence and under the general maritime law of the United States for unseaworthiness of the vessel (first cause), for maintenance and cure and unpaid wages (second cause), and for damages against all four defendants under the general maritime law of the United States.

The allegations showing unseaworthiness and negligence include the following:

(a) The wire cable on the boom winch was unseaworthy in that it was twisted and old, and unsuitable for the task assigned;

(b) The bosun of the S. S. Guadalupe negligently rushed Romero, and other members of the crew in the operation of lowering a boom prior to taking on the lumber;

(c) The said bosun negligently ordered an insufficient number of crew members to perform the operation in which Romero was hurt; and negligently ordered Romero's assistants away and permitted the winch to be started while he was shorthanded and there was nobody to supervise the work;

(d) The bosun was negligently called away from and negligently left the place where Romero was working, without providing proper supervision of the man operating the winch and a man to help Romero handle the metal lines;

(e) Garcia and International were negligent in causing the bosun to leave his post of supervising the topping of the boom;

serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew."

Such waiver of jurisdiction as Art. XXIII contained was in large measure abrogated on July 1, 1916, in accordance with provisions of the Seaman's Act of March 4, 1915 (38 Stat. 1164), to which Sec. 33 of the Jones Act of June 5, 1920, c. 250, Sec. 33 (41 Stat. 1007) was an amendment.

Article VI of the Spanish treaty also guarantees Spanish subjects "free access to the Courts . . . as well for the prosecution as for the defense of their rights."

It was against this background that Sec. 33 of the Jones Act was enacted, and the decision herein denying *jurisdiction* thus conflicts directly or in principle with such treaty provision, and conflicts in principle with this Court's decisions in *Wildenhus's Case, supra,* in *Uravic* v. *Jarka Co., supra,* and in the *William S. Girard* case.

The first clause of Section 33 of the Jones Act, moreover, provides that:

> "*Any* seaman who shall suffer personal injury in the course of his employment *may,* at *his* election, *maintain an action for damages at law,* with the right of trial by jury . . . ." (Italics ours.)

The quoted first clause would be wholly unnecessary if only American seamen were contemplated and if foreign seamen injured here and treated here were to be "intentionally excluded". (Cf. *Uravic* v. *Jarka Co., supra,* 282 U. S. at 239).

In *Strathearn S.S. Co.* v. *Dillon,* 1920, 252 U. S. 348, 354, this Court said of the comparable wage statute provision opening the Federal Courts to foreign seamen:*

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* The wage statute originally had covered only "Every seaman on a vessel of the United States", the proviso being added to make it applicable to seamen on foreign vessels. By contrast, the Jones Act was comprehensive initially. Moreover, it does not involve "a domestic matter of contract" (*Uravic* v. *Jarka Co., supra,* 282 U. S. 239).

(f) The stevedore and land carpenter employees of Garcia, International and Quin rushed the bosun and the crew members to have the boom lowered even with insufficient crew members on the operation;

(g) The land carpenters and stevedores, employees of Quin and International, twisted the boom winch wire by negligently throwing or kicking aside on the deck the wire previously laid out orderly by Romero;

(h) A carpenter or stevedore, in his attempt to aid Romero, tried to straighten out the twisted wire which Romero was feeding to the winch, but negligently failed to straighten or warn of a dangerous snarl in the wire which caused it to lose contact with the niggerhead;

(i) The menacing atmosphere created by the stevedores and carpenters toward the foreign crew members, including Romero, because they were doing an operation usually done by said stevedores and carpenters for additional pay, made the whole operation additionally dangerous.

Jurisdiction was alleged of the claims against Compania nd Garcia as an action brought under the general maritime law of the United States and all statutes amendatory hereof including Section 33 of the Jones Act (R. 200a).

Jurisdiction was alleged of the claims against International and Quin as an action cognizable under the Constitution of the United States and the general maritime aw of the United States (R. 202a, 204a).

Jurisdiction as to these defendants was also predicated n diversity of citizenship (R. 202a, 203a) and diversity lso exists as to Garcia.

The four answers of all defendants (R. 207a, 211a, 216a, 20a) put in issue substantially all of the allegations of ach of the four causes of action, the answers of Compania nd Garcia pleaded as a defense a lack of jurisdiction of. e subject matter (R. 214a; 219a); and the answer of ompania also pleaded as a defense that plaintiff's sole

"No such provision was necessary as to American seamen, for they had the right independently of this statute to seek redress in the courts of the United States, and, if it were the intention of Congress to limit the provisions of the act to American seamen, this feature would have been wholly superfluous."

See also:

Strathearn S.S. Co. v. Dillon—An Unpublished Opinion By Mr. Justice Brandeis, 69 Harvard L. Rev. 1177, 1179, 1189.

If American seamen only were to be included by the Jones Act, it would have been necessary only to enact a provision that the Federal Employers' Liability Act should apply to American seamen, and without enacting at all the quoted first clause. For 28 U. S. C. Sec. 1331, without more, would then afford any American seaman jurisdiction of an action at law based on such a statute; and in an action at law under Sec. 1331 the American seaman would be entitled to a jury trial. The Seventh Amendment of United States Constitution, indeed, would guarantee jury trial.*

But with reference to a foreign seaman injured here, and requiring hospitalization and treatment here, the affirmative provision that he "may, at his election, maintain an action for damages at law, with the right of trial by jury" is highly significant and apt. For in his case this provision is effective to enable him to elect between Jones Act rights and foreign law rights, and thus preclude the tort feasors from defeating his action under the Jones

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* It is significant that, by comparison, the Federal Employers' Liability Act itself contains no similar provision that the injured railway employee may at his election maintain an action for damages at law with a right of trial by jury—this, for the very obvious reason that he would have such right under 28 U. S. C. Sec. 1331 and the Seventh Amendment, once the liability provision, 45 U. S. C. Sec. 51, was enacted.

It is significant also that *Strathearn S.S. Co.* v. *Dillon* was decided March 29, 1920, just 68 days before the Jones Act was enacted on June 5, 1920, after adding Sec. 33 with its first clause equally unnecessary for American seamen.

rights were governed by an alleged Spanish contract and the laws of Spain and that plaintiff cannot maintain suit against it under the Jones Act or the general maritime law of the United States and that plaintiff's sole remedy must be asserted in Spain or before a representative of the Spanish government (R. 214a-215a).

Contested discovery proceedings were had preparatory for *trial* (*Romero* v. *International, etc.*, 1955 A. M. C. 1814).

Motion, Pretrial and Decisions Below

When the action was called and assigned for trial a motion was made by defendants to dismiss the complaint for "lack of jurisdiction of the subject matter."

The district judge thereupon conducted a pre-trial hearing on this motion and repeatedly asserted that it was confined to such motion (R. 97a; 117a; 194a). In the conclusion of the hearing the court stated:

> "The Court: . . . However, so there will be no misunderstanding, I am proceeding on the basis that each of the four defendants has moved orally, which brought on this pretrial hearing, for a dismissal of the complaint upon the ground of *lack of jurisdiction of the subject matter.*
>
> Mr. Quinlan: *That is right.*
>
> The Court: *And those are the motions I am going to decide"* (R. 194). (Italics ours.)

Over petitioner's objections (R. 8a, 19a-22a, 87a, 97a-103a, 176a) and subject to motion by petitioner to strike out the evidence (R. 104a-106a, 173a, 176a-177a), the Court, nevertheless, received evidence relating to the relationship between Compania and Garcia or its partnership predecessor all commencing in 1935 and with reference to the management, operation and control of the vessel, and evidence under the fourth defense of Compania based on allegations of Spanish contract and Spanish law.

Over objection and motion to strike the court received in evidence a contract signed by Romero for a previous

Act by pleading as defense a different right and remedy under foreign law or foreign contractual provisions.

Petitioner submits, moreover, that in every sense the case at bar on the merits is one involving torts which "go beyond the scope of discipline and private matters that do not interest the territorial power" (*Uravic* v. *Jarka Co., supra,* 282 U. S. 240), and which are of intense interest to the territorial power and its citizens and are consequently within its Jones Act legislation.

The injury to petitioner herein was sustained during unloading operations while the vessel was tied up at a pier in Hoboken, New Jersey; *i. e.* while "in a practical sense, the ship . . . was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore", and "was due to hurried and imprudent unloading" (Cf. *The Germanic,* 1905, 196 U. S. 589, 597, 595).

Petitioner's left leg was severed and his right leg broken during the unloading operations on board the vessel while it was tied at the American pier, with American workmen as well as Spanish crew members aboard ship and involved in the tort. The injury and loss of blood placed petitioner at the door of death here in an American port. Spain or Spaniards could not save his life. An American ambulance rushed to the ship, took charge of petitioner and rushed him to an American hospital, under protection enroute of American health, traffic and police regulations.

He then was treated for eight months in an American hospital; the services of American physicians, American surgeons and American nurses were required; it was necessary to obtain an artificial limb from an American source; and his amputated leg was buried in an American cemetery.

Of necessity, the American Government itself was obliged to take an interest. In order to permit extended American hospitalization essential to save the seaman's life, it was

round trip voyage notwithstanding that it was limited by its terms to that previous voyage, and that no contract was signed for the voyage on which the accident occurred.

Over objection and motion to strike the court heard the testimony of a foreign law expert for the defendant steamship company, and (without prejudice to petitioner's objections and motion to strike) a contrary opinion of a foreign law expert for the plaintiff, respecting the effect of the said contract and Spanish law, and made a finding that under the law of Spain, when the seaman remained in the employ of the ship during subsequent voyages the subsequent service was under the terms and conditions of the original written contract, a finding that an injured Spanish Seaman has an exclusive Workmen's Compensation remedy under Spanish law, and a finding that Garcia was solely an agent for husbanding the vessel.

It was "On the basis of the foregoing" found facts in its opinion that the court turned "to the question of jurisdiction in this court to entertain the action" (R. 251a, Appendix, *infra,* p. 44). It held that "The possible bases of jurisdiction are four: (1) the Jones Act; (2) a Federal question; (3) diversity; (4) discretionary, under the general maritime law; the first three on the law side with a trial by jury, the fourth in admiralty with a trial to the court" (R. 251a; Appendix, *infra,* p. 44).

It ignored the question of jurisdiction of the claim for unpaid wages, and the question of pendent jurisdiction.

As to Jones Act jurisdiction, citing *The Paula,* 2d Cir. 1937, 91 F. 2d 1001, *Paduano* v. *Yamashita,* 2d Cir. 1955, 221 F. 2d 615 and *Gambera* v. *Bergoty,* 2d Cir. 1942, 132 F. 2d, 414, cert. den. 319 U. S. 742, and ignoring this Court's decision in *Lauritzen* v. *Larsen,* 1953, 345 U. S. 571, the district court held that "It is settled *in this circuit*" that an alien seaman cannot sue under the Jones Act for injury suffered while the ship is in an American port and that "Accordingly, the plaintiff's action against the defendant Compania under the Jones Act must be dis-

missed." As respects Garcia, the Court, citing *Cosmopolitan Shipping Co.* v. *McAllister*, 1949, 337 U. S. 783, 790, held that "plaintiff's Jones Act claim against this defendant must also be dismissed" in light of the court's finding that the defendant Garcia was solely an agent for husbanding the vessel. Notwithstanding that the pre-trial hearing was asserted to be on the question of jurisdiction only, the district court stated, in its opinion that:

> "There was *no proof adduced at the pretrial hearing* of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. *Nor did plaintiff offer any proof of any negligent act* by defendant Garcia within the scope of the agency, contributing to his injury." (Italics ours.)

It thus treated the *jurisdiction* motion and hearing as though it were a trial of the merits, but without affording plaintiff an opportunity to try the merits.

As respects "Jurisdiction because of a federal question" the district court, citing *Paduano* v. *Yamashita, supra*, and *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir. 1956, 234 F. 2d, 253, held that "It is similarly established *in this circuit* that the facts herein present no federal question."

As respects jurisdiction because of diversity the district court, citing a Southern District court decision in *Tsitsinakis* v. *Simpson, Spence and Young*, S. D. N. Y., 90 F. Supp. 578, held that necessary diversity is lacking because plaintiff and defendant Compania are both subjects of Spain.

As respects discretionary jurisdiction in admiralty—which plaintiff did not plead—the court, citing a Southern District court decision, *Nakken* v. *Fernley and Egger*, S. D. N. Y., 137 F. Supp. 288, held that in light of its findings as to Spanish law the court would decline jurisdiction in admiralty even as a matter of discretion and that "the defendants' motions are granted and the complaint herein is dismissed."

On appeal by plaintiff the Court of Appeals for the Second Circuit affirmed on the opinion of the District Court.

Notwithstanding that the amended complaint in the second cause of action pleaded a failure by defendants "to pay him wages to the end of the voyage" (R. 201a), and that this was argued in both courts, neither the District Court nor the Court of Appeals mentioned this in dismissing the complaint for lack of jurisdiction. Petitioner had cited in both courts this Court's decision in *Strathearn S. S. Co.* v. *Dillon,* 1920, 252 U. S. 348, holding that our wage statutes are specifically applicable to seamen on foreign vessels while in harbors of the United States, and that by statute the courts of the United States are open to such seamen for their enforcement.

Both the District Court and the Court of Appeals also failed to consider the question of pendent jurisdiction, fully argued by petitioner in both courts.

Reasons for Allowance of the Writ

I

Basic questions reserved by this Court, and the lower Courts' desire that this Court review and settle them.

This court has never decided but has noted and reserved for decision the two great questions

(1) whether the District Court under 28 U. S. C. Section 1331 has jurisdiction of an action based on the general maritime law of the United States as one which "arises under the Constitution, laws, or treaties of the United States" (see *Pope & Talbot* v. *Hawn,* 1953, 346 U. S. 406, 410, footnote 4; and see "II", *infra,* pp. 12-19); and

(2) whether Section 33 of the Jones Act is applicable when an alien seaman is injured on a foreign vessel in an American port (see *Plamals* v. *Pinar del Rio,* 1928, 277 U. S. 151, 155; *Uravic* v. *Jarka,* 1931, 282 U. S. 234; *Lauritzen* v. *Larsen,* 1953, 345 U. S. 571; and see "III", *infra,* pp. 20-26).

During the pre-trial hearing herein the District Court stated, with reference to both these questions that "*until the Supreme Court finally speaks we are never going to know . . . I only wish that the day would come. This may be the agency for getting the Supreme Court to speak once and for all*" (R. 99a). See also: *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 2d Cir., 1955, 221 F. 2d 615, 617.

A writ should be granted to review these and the other important questions hereinabove stated, presented by the decisions made below, and hereinafter discussed, and to resolve the conflicts in decisions with respect thereto.

II

The unresolved question and conflicting decisions as to jurisdiction of claims based on the general maritime law of the United States.

1. There is conflict and difference of opinion in three circuits as to whether the District Court has jurisdiction under 28 U. S. C. A. Sec. 1331 of the subject matter of a civil action based on the general maritime law of the United States; in other words, whether a controversey which arises under the general maritime law of the United States is one which "arises under the Constitution, laws, or treaties of the United States." One Circuit says "Yes"; two Circuits say "No."

Jurisdiction has been sustained by the First Circuit Court of Appeals in *Doucette* v. *Vincent*, 1st Cir., 1952, 194 F. 2d 834, and *Jansson* v. *Swedish American Line*, 1st Cir., 1950, 185 F. 2d 212.

Jurisdiction has been denied by the Third Circuit Court of Appeals in *Jordine* v. *Walling*, 3rd Cir., 1950, 185 F. 2d 662, and by the Second Circuit in *Paduano* v. *Yamashita Kisen Kabushiki Kaisha*, 2d Cir., 1955, 221 F. 2d 615, and in the case at bar. See also *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2d Cir., 1956, 234 F. 2d 253.

The conflict between the First and Third Circuits was noted by this Court in *Pope & Talbot Inc.* v. *Hawn*, 1953, 346 U. S. 406, 410, footnote 4, where, because of diversity sufficient to support jurisdiction, this Court said:

> "In this situation we need not decide whether the District Court's jurisdiction can be rested on 28 U.S. Code, sec. 1331 as arising 'under the Constitution, laws or treaties of the United States.' See *Doucette vs. Vincent*, 194 F. 2d. 834 and *Jansson vs. Swedish American Line*, 185 F. 2d. 212 Cf. *Jordine vs. Walling*, 185 F. 2d. 662."

In the *Paduano* case, the Second Circuit disagreed with the First Circuit, and disagreed with the reasoning while agreeing with the result in the Third Circuit case; and specifically stated that *"the conflict must ultimately be resolved by the Supreme Court"* (221 F. 2d 617). (Italics ours.)

In the case at bar the lower courts cited and relied on the *Paduano* case; and the conflict in the three circuits is now presented for determination by this Court.

2. The case also conflicts in principle with *Erie R. R. Co.* v. *Tompkins*, 1938, 304 U. S. 64, interpreting the term "laws of the several states" in 28 U. S. C. Sec. 1652,*

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* One commentator (*The Extension of Federal Question Jurisdiction to Maritime Claims: A New Jurisdictional Theory* (1952), 66 Harvard L. Rev. 315, 324) has stated that:

> "The authorities cited by the *Jordine* case to support its position simply do not establish or even imply that 'laws' in Section 1331 excludes decisional law, and there appear to be no holdings elsewhere to that effect. It may, however, be significant that *Erie R. R.* v. *Tompkins* interpreted the word 'laws' in another statute to include decisional law."

Another commentator five years earlier (*The Tangled Seine: A Survey of Maritime Personal Injury Remedies* (1947), 57 Yale L. J. 243, 245), had said of *Southern Pacific Co.* v. *Jensen*, 1917, 244 U. S. 205, that:

> "The case represents the *Erie* v. *Tompkins* of the admiralty field except that the shoe is on the other foot, the state courts being obliged to follow 'substantive' law as declared by the Supreme Court, but left free to apply their own 'procedure'."

and with *Warren* v. *U. S.*, 1951, 340 U. S. 523, interpreting the term "national laws" in Art. 2, par. 2 of the Shipowners Liability Convention (54 Stat. 1693).

In those cases this court held that such provisions include unwritten as well as written law, whether legislative or Court-made, saying in *Warren* v. *U. S., supra,* that:

> "The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts" (340, U. S. 526).

And that:

> "Much of this body of maritime law had developed through the centuries in judicial decisions" (340 U. S. 527).

We submit that the term "laws of the several states" in 28 U. S. C. Sec. 1652 and the opposite term "laws of the United States" in 28 U. S. C. Sec. 1331 are comparable and complementary terms in the Judicial Code, and that, equally as held of the Section 1652 term "laws of the several states" in *Erie R.R. Co.* v. *Tompkins,* the term "laws of the United States" in Section 1331 includes decisional law, whether originally antedating and incorporated by the Constitution, or subsequently established by controlling decisions of this Court.

3. In the *Paduano* decision and this case the lower courts also failed to note the difference between the comprehensive and unqualified term "laws of the United States" in the jurisdiction provisions of Art. 3, Sec. 2 of the Constitution, which 28 U. S. C. A. Sec. 1331 employs, and the qualified term "laws of the United States, *which shall be made* in pursuance thereof," in the supremacy provision of Art. 6 of the Constitution, which sec. 1331 does *not* employ. It thus conflicts in principle with *The*

Mayor v. *Cooper*, 1867, 6 Wall. (73 U. S.) 247, 253, where this Court said:

> "The decisions of the courts of the United States within their sphere of action, are as conclusive as the laws of Congress made in pursuance of the Constitution."

4. As this court has frequently held, the substantive general maritime law of the United States is a part of the laws of the United States.

The Lottawanna, 1874, 21 Wall. (88 U. S.) 558, 573, 576;
Knickerbocker Ice Co. v. *Stewart*, 1920, 253 U. S. 149, 160;
Carlisle Packing Co. v. *Sandanger*, 1922, 259 U. S. 255, 259;
Panama Railroad Co. v. *Johnson*, 1924, 264 U. S. 375, 385, 386;
Utavic v. *Jarko Co.*, 1931, 282 U. S. 234, 240;
Garrett v. *Moore McCormack Co.*, 1932, 317 U. S. 239, 245, 246;
O'Donnell v. *Great Lakes Dredge & Dock Co.*, 1943, 318 U. S. 36, 40;
Swanson v. *Mara Brothers*, 1946, 328 U. S. 1;
Seas Shipping Co. v. *Sieracki*, 1946, 328 U. S. 85, 88;
Pope & Talbot Inc. v. *Hawn*, 1953, 346 U. S. 406, 409.

As said in *The Lottawanna, supra:*

> "Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as *its own law*, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime

law of the particular nation that adopts it. And without such voluntary adoption it would not be law . . . .

"To ascertain, therefore, what the maritime *law* of this country is, . . . The decisions of this court . . . are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed." (21 Wall. 573, 576.) (Italics ours.)

In *Knickerbocker Ice Co.* v. *Stewart, supra,* this Court said:

"The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction" (253 U. S. 160).

While, therefore, as distinct from *proceedings* in admiralty, "*Proceedings* in a suit at common law . . . are precisely the same as in suits . . . not regarded as maritime, *wholly irrespective* of the fact that the injured party might have sought redress *in the admiralty*" (*The Belfast,* 1868, 7 Wall. (74 U. S.) 624, 645); it is now well settled that in such a case the substantive general maritime law of the United States must be applied, for the simple reason that it is the substantive law of the United States, whether the civil action be in a State court (*Garrett* v. *Moore McCormack, supra,* 1942, 317 U. S. 239, 245, 246) or on the law side of the United States District Court (*Pope & Talbot, Inc.* v. *Hawn,* 1953, 346 U. S. 406, 490; *Seas Shipping Co.* v. *Sieracki, supra,* 1946, 328 U. S. 85, 88).

The substantive general maritime law of the United States is, therefore, equally a part of the "Constitution, laws, or treaties of the United States" within the jurisdictional provisions of 28 U. S. C. Sec. 1331, as are any other provisions of substantive Federal law.

5. It was solely because original jurisdiction was not granted by Congress to the Federal Courts in cases arising under the Constitution or laws of the United States until the Act of March 3, 1875,* 18 Stat. c. 137, page 470, that *prior thereto* this Court held that the only remedy at law in federal courts in actions involving the maritime law was in diversity cases. See *The Belfast, supra,* 1868, 7 Wall. (74 U. S.) 624, 243, 644; *Leon* v. *Galceran,* 1870, 11 Wall. (77 U. S.) 185, 188; and *Steamboat Co.* v. *Chase,* 1872, 16 Wall. (83 U. S.) 522, 533, all decided *before the Act of 1875.*

But in *The Belfast, supra,* this Court said, respecting the *saving* clause, in what is now 28 U. S. C. Sec. 1333:

> "Observe the language of the saving clause under consideration. It is to *suitors,* and *not* to the State Court nor to the Circuit Courts of the United States. Examined carefully, it is evident that Congress intended by that provision *to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy"* (7 Wall. (74 U. S.) 644). (Italics ours.)

Similarly both in *Leon* v. *Galceran, supra,* and *Steamboat Company* v. *Chase, supra,* this court said:

> "He may have an action at law in the case supposed *either in the Circuit Court or* in a State Court, because the common law, in such a case, is competent to give him a remedy, and *wherever the common law is competent to give a party a remedy in such a case, the right to such a remedy is reserved and secured to*

* The Sixth Congress in 1801, 2 Stat. c. 4, pages 89-100, in sec. 11, page 92, had granted such jurisdiction to the Circuit Court; but this had been repealed by the Seventh Congress in 1802, 2 Stat., c. 8, page 132, without application thereof in the Courts.

suitors by the saving clause contained in the Ninth Section of the Judiciary Act" (11 Wall. (78 U. S.) 188, and 16 Wall. (83 U. S.) 533). (Italics ours.)

This language applies equally now to the remedy given by 28 U. S. C. Sec. 1331, as to the diversity remedy given by section 1332.

For the *saving clause* even as originally worded *did not specify diversity* but specified rather "a common law remedy where the common law is competent to give it"; and the present *saving clause,* 28 U. S. C. Sec. 1333, *does not specify diversity* but specifies rather "*all* other remedies to which they are entitled." And the remedy by reason of the action being based on the substantive maritime law of the United States is now equally as available under 28 U. S. C. Sec. 1331, as is the remedy based on diversity under Sec. 1332. The *Paduano* argument respecting removability is as uncontrolling respecting cases under Sec. 1331 as it was of cases under Sec. 1332.

6. The Court of Appeals in *Paduano* misinterpreted the significance of the quoted statement made by Senator Carpenter when the Act of 1875 was before Congress (Hart & Wechsler, The Federal Courts and the Federal System, p. 75), that:

> "The *act of 1789* did not confer *the whole power which the Constitution conferred;* it did not do what the Supreme Court has said Congress ought to do, it did not perform what the Supreme Court has declared to be the duty of Congress. *This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.*" (Italics ours.)

Cases such as *Cohens* v. *Virginia,* 1821, 6 Wheat. (19 U. S.) 264, 378; *Osborne* v. *U. S. Bank,* 1824, 9 Wheat. (22 U. S.) 738, 821 and *Garrett* v. *Moore McCormack, supra,* 1942, 317 U. S. 239, 245, 246, show that the Constitution extended the Federal judicial power, including this Court's

power of review in Federal maritime law cases in State Courts (*Garrett* v. *Moore McCormack, supra*), to all cases involving substantive Federal law. Hence, Senator Carpenter's statement shows that Section 1331—giving to the District Courts "nothing less" than the Constitution authorized—now gives the District Court original jurisdiction at law in any case based on the substantive general maritime law of the United States.

7. The *Paduano* decision also does not properly interpret but conflicts in principle with *American Insurance Co.* v. *Canter*, 1828, 1 Peters (26 U. S.), 511 and with *The City of Panama*, 1879, 109 U. S. 453, and the distinction between cases of admiralty and maritime "*jurisdiction*", and cases arising under the Constitution and laws of the United States.

The Federal District Courts on the law side, alike with the State courts, cannot exercise admiralty and maritime "*jurisdiction*", i.e., jurisdiction "*in admiralty*", as distinct from "*all other remedies*" saved by 28 U. S. C. Sec. 1333 to "suitors in *all* cases". But where the matter in controversy is one based on the substantive maritime law of the United States, which, if brought in a State Court would be reviewable by this Court as one arising under the Constitution, laws or treaties of the United States, the Federal District Courts now have original jurisdiction thereof under 28 U. S. C. Sec. 1331, if such matter in controversy also exceeds the sum or value of $3,000.00.

8. This important question of jurisdiction under 28 U. S. C. Sec. 1331, upon which the Circuits are now in conflict, affects claims of plaintiff against all of the defendants, including (1) his claims against the owner and operators of the vessel for unseaworthiness, maintenance and cure and unpaid wages, and (2) his claims against the third-party defendants for their negligence. A writ should be granted to resolve the conflict and settle this important question, as well as in the interests of justice.

III

The unresolved question and conflicting decisions as to Jones Act applicability to a tort on a foreign ship in an American port and foreign law defenses thereto.

The great question under the Jones Act reserved by this Court in *Plamals* v. *Pinar del Rio*, 1928, 277 U. S. 151, 155,* *supra*, and undetermined in either *Uravic* v. *Jarka*, 1931, 282 U. S. 234, *supra*, or in *Lauritzen* v. *Larsen*, 1953, 345 U. S. 571, *supra*, this Court stated as follows:

> "whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters" (277 U. S. 155).

That question is a principal "subject matter" of the action against Compania and Garcia; and a writ should be granted to review the decision which in dismissing the complaint for "lack of jurisdiction of the subject matter" has predicated such dismissal on a determination of that question.

The very reservation of that question in *Plamals* v. *Pinar del Rio, supra*, is indicative of its importance and substantial character and that it is a question which this Court should review and settle if reached herein.**

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* *Plamals* v. *Pinar del Rio*, 1928, 277 U. S. 151, 155, *supra*, was the first case to reach this court involving a Jones Act claim of an alien seaman injured on a foreign vessel in the United States. A seaman on a British vessel sued *in rem* under the Jones Act. The District Court dismissed the libel at trial on the theory that the Jones Act was inapplicable and the British Compensation law applied. But this Court held instead that the Jones Act did not provide a lien enforceable by *in rem* proceedings; and this Court specifically left open the question whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters (277 U. S. 155).

** Petitioner submits that determination of such question involves an *exercise* of jurisdiction. See "IV", pages 26-30, *infra*.

The question was in part decided three years later in *Uravic* v. *Jarka Co.*, 1931, 282 U. S. 234, *supra*, when this court reversed the New York Court of Appeals and held a defendant employer liable under the Jones Act for death of a stevedore on a German vessel tied up at an American port. The court distinguished the case of public armed vessels and, pointing to the fact that, as in *Wildenhus's Case*, 1887, 120 U. S. 1, crimes committed on private vessels are punishable by the territorial jurisdiction, said:

> "We see no reason for limiting the liability for *torts* committed there when they go beyond the scope of *discipline* and private matters that *do not interest* the territorial power" (282 U. S. 240). (Italics ours.)

The Court rejected an argument that the venue clause and the lack of a lien "shows that seamen on a foreign vessel were not contemplated", saying:

> "But the question is not whether they were thought of for the purpose of inclusion, but *whether they were intentionally excluded from a description that on its face includes them* . . . If the rule is wise there is no reason why it should not be universal. Wise or not, it is law and the question is why general words should not be generally applied. What would be the alternative? Hardly that the German law should be adopted. *It always is the law of the United States that governs within the jurisdiction of the United States*, even when for some special occasion this country adopts a foreign law as its own" (282 U. S. 239, 240). (Italics ours.)

Uravic v. *Jarka Co.*, *supra*, is thus indicative, but without fully deciding, that the Jones Act applies to an injury to a seaman on a foreign vessel within the waters of the United States.

In *Uravic* v. *Jarka Co.*, this Court cited *The Schooner Exchange* v. *McFaddon*, 1812, 7 Cranch (11 U. S.), 116,

deemed necessary by immigration officials to reclassify petitioner to permit him to remain here to undergo hospitalization, and then to prosecute his claims to damages, instead of requiring him to depart as a foreign seaman within twenty-nine days after arrival, as would have been the case except for his tragic injury and extended and expensive treatment necessitated here. Both this and the prosecution of plaintiff's claims for damages have required the extended services of American attorneys for petitioner.

The bill of the American hospital for $3,750.60, as well as bills of other Americans for medical services, for the artificial limb, and for the American burial of his amputated leg, all remain unpaid, and are liens on plaintiff's claims against defendants herein. All these items, owing to Americans and remaining unpaid, are part of the damages sought to be recovered in the American courts. Petitioner's American attorneys also are unpaid.

Three American companies, whose employees were on board the vessel and are charged with negligence, are defendants in the action.

The tort and its consequences thus are in every sense American, and within the Act both literally and as construed in *Uravic* v. *Jarka Co., supra;* and on that point the decision herein violates the statute, the principles of international law and treaty provisions, and conflicts in principle with the *Uravic* case.

IV

The court's failure to distinguish between jurisdiction and merits, depriving petitioner of his right to a trial of the merits in the manner prescribed by law.

This court has repeatedly held that a complaint which sets forth a substantial claim under a federal statute presents a case within the jurisdiction of the District Court, as

a federal court; that there is a fundamental distinction between the question of jurisdiction and the question of merits; that such jurisdiction cannot be made to stand or fall upon the way the court may decide the legal sufficiency of the facts alleged or the legal sufficiency of facts proven; and that its decision either way upon either question "is predicated upon the *existence* of jurisdiction, not upon the *absence* of it."

Binderup v. *Pathe Exchange*, 1923, 263 U. S. 291, 305, 306;
The Fair v. *Kohler Die & Specialty Co.*, 1913, 228 U. S. 22, 25;
Bell v. *Hood*, 1946, 327 U. S. 678, 681, 682;
Alma Motor Co. v. *Timpkin Detroit Axle Co.*, 1946, 329 U. S. 129, 130;
Swafford v. *Templeton*, 1902, 185 U. S. 487, 491, 493, 495;
Huntington v. *Laidley*, 1900, 176 U. S. 688;
Louisville Trust Co. v. *Knott*, 1903, 191 U. S. 225, 233;
Public Service Co. v. *Corboy*, 1919, 250 U. S. 153, 162-163;
Smithers v. *Smith*, 1907, 204 U. S. 632, 645;
Barry v. *Edmunds*, 1886, 116 U. S. 550, 565;
Wetmore v. *Rymer*, 1898, 169 U. S. 115, 122, 128.

In *Bell* v. *Hood*, *supra*, 1946, 327 U. S. 678, 681, 682, reversing both lower courts and sustaining jurisdiction on the plaintiff's complaint, this Court held that "the district court must look to *the way the complaint is drawn* to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." This Court further said that:

> "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact *it must be decided after and*

not before the court has assumed jurisdiction over the controversy. If the Court does *later exercise* its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the *merits,* not for want of jurisdiction." (Italics ours.)

In *Smithers* v. *Smith, supra,* 1907, 204 U. S. 632, 645, this Court reversing a dismissal, disapproved of trying "part of the controversy" on jurisdictional hearing (204 U. S. 644), and said:

"For it must not be forgotten that where in good faith one has brought into court a cause of action, which, *as stated by him,* is clearly within its jurisdiction, *he has the right to try its merits in the manner provided by the Constitution and law, and cannot be compelled to submit to a trial of another kind.* This was clearly stated by Mr. Justice Matthews in *Barry* v. *Edmunds,* 116 U. S. at page 565. . . ." (Italics ours.)

In *Binderup* v. *Pathe Exchange, supra,* 1923, 263 U. S. 291, 306, this Court said:

"*Jurisdiction,* as distinguished from *merits,* is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit."

The question carefully reserved by this Court in *Plamals* v. *Pinar del Rio, supra,* 1928, 277 U. S. 151, 155, and undetermined in either *Uravic* v. *Jarka Co., supra,* or *Lauritzen* v. *Larsen, supra,* certainly is not frivolous.

In *Panama Railroad Co.* v. *Johnson,* 1924, 264 U. S. 375, 383-384, this court, affirming a judgment for plaintiff after trial before a jury, specifically held that an action under Section 33 of the Jones Act was within the jurisdictional

provisions of old Section 24 of the Judicial Code, now 28 U. S. C. Sec. 1331.

The Court also said of the Jones Act that:

> "The statute extends territorially as far as Congress can make it go" (264 U. S. 392).

In the same year, in *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. 2d 329, 1924 A. M. C. 1272, Judge Learned Hand denied a motion to set aside the service of the summons in an action by a British seaman for injury sustained on the deck of a British vessel while it was passing through the Panama Canal.

In *Arthur* v. *Companie Generale Transatlantique*, 5 Cir., 1934, 72 F. 2d 662, the Fifth Circuit Court of Appeals reversed a District Court judgment which had dismissed for lack of jurisdiction an action under the Jones Act by a stevedore of unpleaded nationality, for injuries on a French vessel while discharging cargo in the harbor at Cristobal, Canal Zone, saying that "the right of action is given to all seamen regardless of nationality. Since the action arises under a law of the United States, diversity of citizenship is immaterial" (72 F. 2d 664).

The decision herein conflicts in principle with the foregoing decisions.

Recently in *Lauritzen* v. *Larsen*, 1953, 345 U. S. 571, *supra*, this Court reviewed both the question of jurisdiction and the merits after plaintiff, a Danish seaman, injured on a Danish vessel while in Cuban waters, had obtained after a full trial a judgment for damages under the Jones Act. This court reversed the lower Court's determination of the merits, and held that the Jones Act did not apply to a tort on a Danish vessel in *Cuban* waters. It rejected a "place of contract" factor, saying:

> "But a Jones Act suit is for tort" (345 U. S. 548).

But in *Lauritzen* v. *Larsen, supra,* this Court did *not* determine whether the Jones Act applies to an injury to an alien seaman on a foreign vessel in an *American* port. And as respects *jurisdiction,* even where the injury occurred on a foreign ship in Cuban waters, *this Court specifically sustained jurisdiction of the District Court,* and said:

> "The question of jurisdiction is shortly answered . . . A cause of action under our law was *asserted* here . . ." (345 U. S. 574-575).

Since jurisdiction was sustained in *Lauritzen* v. *Larsen, supra,* 1953, 345 U. S. 571, even where the claim was by an alien seaman for a tort on a foreign vessel in *foreign* waters; and since that case did not purport to decide the question of merits left open in *Plamals* v. *Pinar del Rio, supra,* 1928, 277 U. S. 151, 155, and not settled by *Uravic* v. *Jarka Co., supra,* whether the Jones Act applies when a foreign seaman employed on a foreign ship is injured in *American* waters, it clearly was error in the case at bar to dismiss the action for "lack of jurisdiction of the subject matter." The Court has and must first *exercise* jurisdiction of the subject matter in order to determine that question of merits.

V

Evidence on the merits should not have been admitted, and should have been stricken out; and the findings based thereon should be set aside.

Petitioner submits further that for the foregoing reasons, the evidence offered respecting such alleged contract and the law of Spain should have been excluded on plaintiff's objection and should have been stricken out on plaintiff's motions to strike the same, and that the findings based thereon should be set aside as clearly erroneous.

In *The Fair* v. *Kohler Die & Specialty Co.*, 1913, 228 U. S. 22, 25, *supra*, the court specifically distinguished in this respect the jurisdictional question when jurisdiction is rested on the plea of a federal statutory cause of action, and the jurisdictional *issue* where jurisdiction is rested on diversity of citizenship. In the latter case *diversity* jurisdiction may be defeated by a plea of the citizenship of the parties, and a pre-trial hearing thereon with evidence taken and findings made as to the jurisdiction issue of *diversity*. But this court specifically held that, by contrast, *"when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim."*

The decision herein overruling plaintiff's objection to the course pursued and the taking of evidence on the merits and denying plaintiff's motion to strike the testimony and exhibits (R. 247a; plaintiff's claim of surprise, R. 8a; objections, R. 19a-22a; exception, R. 22a; objections, R. 87a; exception, R. 88a; objections R. 97a-103a, 176a; exception 176a; motion to strike, R. 104a-106a, 173a, 176a-177a) thus conflicts either directly or in principle with this Court's decision in *The Fair* v. *Kohler Die & Specialty Co.* and other decisions herein above cited page 27, *supra*.

The District Court referred to 5 Moore's Federal Practice, 2d Ed. pages 38, 36 (R. 41a-42a, 247a) which, however, relates to an issue of jurisdiction "such as *diversity*"; and this points up the error of the lower courts in failing to apply herein the distinction specifically made by this Court in *The Fair* v. *Kohler Die & Specialty Co., supra*.

The evidence taken herein also was improper and the findings made thereon are clearly erroneous because the contract offered and admitted covered only a prior voyage and not the voyage here involved.

Moreover, since the Jones Act incorporates the Federal Employers Liability Act, the injured seaman also has

the benefit of Section 5 of the Federal Employers Liability Act (45 U. S. C. Sec. 55), which provides that:

> "Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."

Construing such Section 5, this court has held in *Phila. B. & Wash. R. Co.* v. *Schubert,* 1912, 225 U. S. 603, 613, that "the purpose or intent" mentioned do not refer simply to an actual intent of the parties to circumvent the statute, but that the purpose and intent of the contract or regulations "is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."

In *Duncan* v. *Thompson,* 1942, 315 U. S. 1, 6, this court held that "Congress wanted Section 5 to have the full effect that its phraseology implies."

Construing together the Jones Act election right (46 U. S. C. Sec. 688), and this incorporated provision of Sec. 5 of the Employers' Liability Act (45 U. S. C. Sec. 55), it is clear on the merits that "Any seamen" entitled to the benefits of the Jones Act and electing to sue thereon cannot be deprived of the benefits thereof by any advance contract, rule, regulation, or device to have the law of a foreign country apply instead, and that any such contract provision is invalid and inadmissible in a Jones Act action.

The issue whether defendant Garcia is liable under the Jones Act, or is a husband of the ship who could not be liable as employer under the Jones Act, petitioner submits, is also an issue of merits which cannot properly be heard, tried and determined on a motion to dismiss for "lack of jurisdiction of the subject matter"; and the evidence and findings thereon should be stricken out. In view of the extraordinary circumstances alleged, this issue

cannot be determined without the court exercising jurisdiction and trying the case on the merits before a jury.

The lower courts' decision herein as respects Garcia, is not in accord with but conflicts in principle with *Cosmopolitan Shipping Co.* v. *McAllister*, 1949, 337 U. S. 783, relied on by the Court (R. p. 252a; Appendix, *infra*, p. 45), and with *Fink* v. *Shepard S. S. Co.*, 1949, 337 U. S. 810; and *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 1949, 337 U. S. 801, simultaneously decided therewith. *Cosmopolitan Shipping Co.* v. *McAllister*, was decided as a determination of the merits after full trial of the case and verdict by a jury. It involved a general shipping agent of the United States Government under a war shipping contract subject to the War Shipping Administration (Clarification) Act, 57 Stat. 45, 40 U. S. C. Sec. 1291; and does not preclude *pro hac vici* ownership as between private owners and operators. The agent had only the duties of a husband to take care of shoreside business of the ship, but with no duties of a berthing agent which Garcia in this case had or as to actual management of the vessel. *Fink* distinguishes for seamen a "party to such a relation with them that it could be held vicariously liable for their torts." The *Weade* case, which also involved a judgment after trial for injuries on a War Shipping Administration vessel, held that it was erroneous to direct judgment notwithstanding the verdict, saying:

> "As there were suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's *own negligence* while acting as general agent, this direction should not have been given" (337 U. S. 809).

The decision below conflicts in principle, in this respect and as respects the *pro hac vici* principle, also with *The Standard Oil Co.* v. *Anderson*, 1909, 212 U. S. 215; *Linstead* v. *Chesapeake & Ohio Ry. Co.*, 1928, 276 U. S. 28 and

Denton v. *Yazoo & Mississippi Valley RR. Co.*, 1932 284 U. S. 305. Petitioner submits that if the injured employee is a seaman it is not necessary under the Jones Act that a negligent employee be himself a seaman or member of the crew. Cf. *Pederson* v. *Delaware L. & W. R. Co.*, 1913, 229 U. S. 146, 150-151.

VI

Pendent jurisdiction; wage claim jurisdiction; diversity jurisdiction.

Liability herein is asserted against both Compania and Garcia, moreover, on the basis of the general maritime law of the United States as well as under the Jones Act, and presents for determination the question and conflicts noted under "II" *supra*, pages 12-19.

As respects both Compania and Garcia, the dismissal further conflicts in principle with *Hurn* v. *Oursler*, 1933, 229 U. S. 238; *Doucette* v. *Vincent*, 1st Cir. 1952, 194 F. 2d, 834, 840; *Nolan* v. *General Seafoods Corp.*, 1 Cir., 1940, 112 F. 2d 515, 517, and *Lindquist* v. *Dilkes*, 3 Cir., 1942, 127 F. 2d 21. For, with jurisdiction existing of the Jones Act claim, there would be *pendent* jurisdiction also of the claims against them under the general maritime law, even if such jurisdiction would otherwise not exist under 28 U. S. C. Sec. 1331, and even if the claims under the Jones Act were determined against petitioner on the merits.

The dismissal of the second cause of action which claims wages to the end of the voyage conflicts also with this Court's decision in *Strathearn S. S. Co.* v. *Dillon*, 1920, 252 U. S. 348, showing that the courts of the United States are open to foreign seamen for enforcement of such claims.

Even the holding that there was no diversity jurisdiction presents an important question and, petitioner submits,

conflicts in principle with 26 U. S. C. A. Sec. 1332, and this court's decisions in *Strawbridge* v. *Curtiss,* 3 Cranch (7 U. S.) 267, and *Indianapolis* v. *Chase Nat. Bank,* 1941, 314 U. S. 63. This is because the "matter in controversy" between petitioner and Compania (the only defendant as to whom diversity is lacking) involves the injury of an *employee* and claims therefor under the Jones Act and general maritime law of the United States and for maintenance and cure and unpaid wages under the maritime law of the United States, and is distinct from the "matter in controversy" against the third-party defendants for their own negligence.

VII

The unfair requirement that petitioner waive in advance any claim to law jurisdiction, as a condition to allowing admiralty jurisdiction.

If this Court should hold, as respects any of defendants, that only jurisdiction in admiralty or only diversity jurisdiction is available to petitioner, this Court should then determine whether the District Court, as guardian of its seaman ward, erred in requiring petitioner, at pre-trial hearing and in advance of the Court's determination of the great questions of jurisdiction herein, to elect whether to amend his complaint and proceed upon diversity or in admiralty, and in holding that petitioner "elected at the pre-trial hearing not to amend his complaint and proceed" upon diversity or in admiralty.

VIII

The case is one of "special and important reasons for the grant of certiorari."

In a recent Federal Employers' Liability Act case, *Rogers* v. *Missouri P. R. Co.,* 1957, 352 U. S. 500, this Court said:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination"

and that "this Court is vigilant to exercise its power of review in any case where it appears the litigants have been improperly deprived of that determination".

CONCLUSION

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES:

Art. III Sec. 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under this Authority; . . .—to all Cases of admiralty and maritime Jurisdiction; . . .—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> . . . In all the . . . Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Art. VI, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . ."

The Judicial Code, 28 U. S. C. A. Secs. 1331-1335 and 1652 provide:

> "1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY.
>
> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and cost, and arises under the Constitution, laws or treaties of the United States.
>
> "1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY.
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in contro-

versy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

. . .

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties . . .

"1333. ADMIRALTY, MARITIME AND PRIZE CASES.

The District courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

"1652. STATE LAWS AS RULES OF DECISION.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

46 U. S. C. A. Sec. 688; Act of June 5, 1920, ch. 250 Sec. 33, 41 Stat. 1007:

"RECOVERY FOR INJURY TO OR DEATH OF SEAMAN.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;"

45 U. S. C. Secs. 51, 55; Federal Employers' Liability Act of April 22, 1908, ch. 149, Secs. 1, 5, 35 Stat. 65, 66; August 11, 1939, ch. 685, Sec. 1, 53 Stat. 1404:

"SEC. 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce . . . between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

"SEC. 55. CONTRACT, RULE, REGULATION, OR DEVICE EXEMPTING FROM LIABILITY; SET-OFF.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Opinion of District Court, Southern District of New York.

SUGARMAN, D. J.:

On May 12, 1954 the S. S. Guadalupe was berthed at Pier 2, Hoboken, New Jersey. During preparation for the receipt of cargo, Francisco Romero, a member of the crew was severely injured. Twelve days later he commenced suit in this court.

By amended complaint his action ultimately proceeded against four defendants, *i.e.*, International Terminal Operating Co. (International) Compania Trasatlantica, also known as Spanish Line (Compania), Garcia & Diaz, Inc. (Garcia) and Quin Lumber Co., Inc. (Quin). In due course, the case was sent to a jury part for trial. Prior to the commencement of the trial proper, the defendants orally moved for dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter. Inasmuch as determination of these motions necessitated the resolution of facts, the court ordered a pretrial hearing on the motions.[1]

The objection by the plaintiff to the course pursued, upon the ground that the defendants waived the defense by interposing general appearances is overruled.[2] The objection by the plaintiff to the course pursued upon the ground that he was entitled to a jury trial on the controverted facts is likewise overruled.[3]

The plaintiff's motion to strike all testimony and exhibits is denied.

At a hearing it was stipulated by all parties that (1) plaintiff is a subject of Spain; (2) defendant International is a Delaware corporation; (3) defendant Com-

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[1] F. R. Civ. P. 12 (d).
[2] F. R. Civ. P. 12 (h).
[3] Moore's Fed. Prac. (2d Ed.) 294, para. 38, 36.
Moore's Fed. Prac. (2d Ed.) 2274, para. 12, 16.

pania is a Spanish corporation; (4) defendant Garcia is a New York corporation; (5) defendant Quin is a New York corporation; (6) on May 12, 1954 plaintiff was employed as a member of the crew of and on board the S. S. Guadalupe; (7) The S. S. Guadalupe on May 12, 1954 was owned by the defendant Compania; (8) defendant Quin was an independent contractor under an oral contract with defendant Garcia for certain carpentry work necessary on the S. S. Guadalupe in preparation for the receipt of a cargo of grain; (9) defendant International was employed as Stevedore to load the cargo pursuant to an oral contract with defendant Garcia; (10) the S. S. Quadalupe was registered under the Spanish flag; (11) the voyage, during which plaintiff was injured, commenced at Bilbao, Spain, after which the vessel touched at other Spanish ports, came to the port of New York (Hoboken) went to Havana, Vera Cruz, back to Havana and returned to Hoboken, where it was then the accident happened.

The parties refused to stipulate as to the management, operation and control of the S. S. Guadalupe on May 12, 1954 and as to the contract of employment under which plaintiff was aboard the vessel on that day. Proof was taken on the two disputed issues.

As to Management, Operation and Control of the S. S. Guadalupe on May 12, 1954.

The plaintiff's amended complaint alleges in Paragraph Fifth that defendant Compania operated, managed and controlled the vessel and in Paragraph Sixth that defendant Garcia operated, controlled and managed the vessel. On the basis of the deposition of defendant Garcia, through its treasurer, William Martinez, taken by plaintiff on June 10, 1954, and the contract between defendants Garcia and Compania, it is manifest that defendant Garcia was no more to the vessel than a husbanding agent acting in every

respect for its principal, defendant Compania. It appears without contradiction that neither Garcia nor any stockholder thereof owns any stock in Compania, nor is any director of Garcia a director of Compania, nor does Garcia exercise any control over Compania. It further appears that the relationship between Garcia and Compania originated in 1935 when a partnership, the predecessor of Garcia, commenced representing Compania in this port. That partnership was succeeded by the present corporate defendant, Garcia, and pursuant to a contract made in 1948 between Garcia and Compania, the former has since that time husbanded the latter's vessels in this port. It further appears that defendant Garcia represents as many as ten other Spanish and Cuban ship owners in this port, none of whom is a subsidiary of defendant Compania. It further appears that defendant Garcia did not contribute financially to the purchase or construction of the S. S. Guadalupe. As such agent, defendant Garcia pays the pilot and docking charges and the charges for water and supplies for the vessels of defendant Compania, but all for the account of the defendant Compania. For this service defendant Garcia receives from the defendant Compania commissions, based upon the incoming and outgoing freight and passenger traffic. There was no proof adduced at the pre-trial hearing of management, operation and control by Garcia except as it might arise by virtue of the agency agreement. Nor did plaintiff offer any proof of any negligent act by defendant Garcia within the scope of the agency, contributing to his injury.

As to the Contract under which the Plaintiff Was a Crew Member of the S. S. Guadalupe on May 12, 1954.

There was received in evidence an agreement executed on October 9, 1953 between plaintiff and defendant Compania. Within its four corners, that document clearly con-

templates the plaintiff's employment by the said defendant for one round trip on the vessel to commence about October 10, 1953. It is agreed by all parties that no subsequent written contract was entered into between plaintiff and defendant ship owner. Nevertheless, at the completion of the round trip specifically identified in the written contract, plaintiff remained on board the vessel performing the same functions as deck hand for subsequent voyages, during one of which he met with his injury on May 12, 1954 at Hoboken, New Jersey, as aforesaid.

Testimony was taken from experts in Spanish law upon which the court finds that under the codes, laws and regulations of Spain, where a seaman sails on a given voyage pursuant to a written contract and subsequently thereafter uninterruptedly, as in this case, remains in the employ of the ship during subsequent voyages, the subsequent service is under all the terms and conditions set forth in the original written contract.

The written contract provided, among other things, that the parties thereto submitted themselves "to the provisions established by the Codes of Laws regulating Commerce and Labor as also all other regulations in force." It also provided "22. In the event of accidents occurring during the accomplishment of this Contract, these will be subject to the legislative provisions in force to this effect, as also all such will be complied with regarding social insurance as determined by the Laws".

The court also finds, on the basis of the testimony of the experts in Spanish Law, that plaintiff has a right, by virtue of his injury, to a pension for life of somewhere between 35% and 55% of his seaman's wages which, if the negligence of the ship owner is established, may be increased by one half. It is also found that under the pertinent Spanish law, provisions is made for plaintiff for the counterpart of maintenance and dure. It is also found

that plaintiff's said rights may be asserted by demand upon the Spanish Consul in this city.

On the basis of the foregoing stipulated and found facts we turn now to the question of jurisdiction in this Court to entertain the action.

The amended complaint in four causes of action seeks (a) damages against the defendant Compania and Garcia under the Jones Act for negligence and under the general maritime law for unseaworthiness of the vessel; (b) damages against the defendant Compania for maintenance and dure; (c) damages against all four defendants under the general admiralty law for a maritime tort. A jury trial is demanded. The possible bases of jurisdiction are four: (1) The Jones Act; (2) a federal question; (3) diversity; (4) discretionary, under the general maritime laws; the first three on the law side with a trial by jury; the fourth in admiralty with a trial to the court.

(1) Jurisdiction under the Jones Act.

It is settled in this circuit since *the Paula*[4] and as recently as *Paduano* v. *Yamashita*, etc.[5] that

> "Alien seamen serving upon foreign ships owned by aliens, and bound upon a voyage which begins and ends outside of the United States cannot sue under the Jones Act for injuries suffered while the ship happens to be stopping at a port of call within our territorial waters."[6]

Accordingly, the plaintiff's action against the defendant Compania under the Jones Act must be dismissed.

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[4] 91 F. 2d 1001.
[5] 221 F. 2d 615.
[6] *Gambera* v. *Bergoty*, 2 Cir. 132 F. 2d 414, cert. den. 319 U. S. 742.

In the light of the finding above that the defendant Garcia was solely an agent for the husbanding of the S. S. Guadalupe, plaintiff's Jones Act claim against this defendant must also be dismissed[7]

(2) Jurisdiction because of a federal question.

It is similarly established in this circuit[8] that the facts herein present no federal question.

(3) Jurisdiction because of diversity.

Inasmuch as plaintiff and defendant Compania are both subjects of Spain, necessary diversity is lacking.[9]

(4) Discretionary jurisdiction in admiralty under the general maritime law.

In the light of the finding hereinabove that under Spanish law the plaintiff may have compensation for his injury with an additional amount if the defendant Compania is found to have been negligent and that plaintiff is also accorded under Spanish law the counterpart of maintenance and cure and that he may assert his claims to a Spanish Consul here, this court should and does decline jurisdiction even in admiralty as a matter of discretion.[10]

For the foregoing reasons, and plaintiff having elected at the pre-trial hearing not to amend his complaint and proceed upon diversity jurisdiction at law against defendants Garcia, International and Quin and having elected

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[7] *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U. S. 783 at 790.

[8] *Paduano* v. *Yamashita, etc., supra.* See also *Troupe* v. *Chicago Duluth & Georgian Bay Transport Company,* F. 2d.

[9] *Tsitsinakis* v. *Simpson, Spence & Young* (S. D. N. Y.), 90 F. Supp. 578.

[10] *Nakken* v. *Fearnley & Egger* (S. D. N. Y.), 137 F. Supp. 288.

not to amend his complaint and proceed by libel in admiralty without a jury on general maritime jurisdiction against (a) all defendants if discretionary jurisdiction against defendant Compania is retained, or (b) if not, against defendants Garcia, International and Quin, the defendants' motions are granted and the complaint herein is dismissed.

It is so ordered.

Dated: June 15, 1956, New York, New York.

SIDNEY SUGARMAN,
United States District Judge.

Judgment entered
William V. Connell
6-15-56 Clerk

7/13/56 Costs taxed in favor of Quin Lumber Co., Inc., in sum of $20.00
HERBERT A. CHARLSON,
Clerk

Costs taxed in favor of International Term. Operating Co. in sum of $20.00

Costs taxed in favor of Compania Trasatlantica & Garcia & Diaz in sum of $363.89. Herbert A. Charlson, Clerk 7/6/56 at 11:45 a. m.

Opinion of Court of Appeals, Second Circuit.

PER CURIAM:

We affirm on Judge Sugarman's workmanlike opinion below which contains a full statement of the facts.

We do not, however, overlook the appellant's invocation of Article VI* of the treaty of 1902 between the United States and Spain, in support of his contention, made apparently for the first time on the appeal, that the court below had jurisdiction under the Jones Act. 46 U. S. C. A. 688. We find nothing in the text of that Article which confers upon the appellant, a Spanish subject, the substantive rights created by the Jones Act. The appellant also argues that the abrogation of Article XXIII** of that treaty somehow demonstrates the presence of jurisdiction below. But as to this, appellant's counsel, with commendable candor, subsequent to argument provided us with a letter from a legal adviser in the State Department which states that Article XXIII of the 1902 treaty has been abrogated only in so far as its provisions are in conflict with the Seaman's

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* "Article VI.

"The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of their rights, in all the degrees of jurisdiction established by law. They can be represented by lawyers, and they shall enjoy, in this respect and in what concerns arrest of persons, seizure of property and domiciliary visits to their houses, manufactories, stores, warehouses, etc., the same rights and the same advantages which are or shall be granted to the citizens or subjects of the most favored Nation."

** "Article XXIII.

"Consuls-General, Consuls, Vice-Consuls and Consular Agents shall have exclusive charge of the internal order of the merchant

(*Footnote continued on following page*)

Act of March 4, 1915, 38 Stat. 1164.* Neither in Article XXIII nor in its abrogation do we find support for the appellant's position on the jurisdictional questions involved.

Affirmed.

(*Footnote continued from preceding page*)

vessels of their Nation and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews without exception, particularly in reference to the adjustment of wages and the execution of contracts. In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such a nature as to cause or be likely to cause a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of the peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consul addressed in writing to either the Federal, State or Municipal Authorities in the United States, or the Authorities or Courts in Spain, and supported by an official extract from the register of the ship or the list of the crew, and the prisoners shall be held during the whole time of their stay in the port at the disposal of the consular officers. Their release shall be granted at the mere request of such officers made in writing. The expenses of the arrest and detention of those persons shall be paid by the consular officers."

* The extent of the abrogation is stated to appear in correspondence and notification of abrogation printed in "Foreign Relations of the United States," 1915, page 3 *et seq.*; 1918, page 10; 1919, vol. 1, pages 54-67.